Filed 6/20/19 Kabba v. Dameron Hospital Assn. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

RAMATU KABBA, Plaintiff and Appellant, v. DAMERON HOSPITAL ASSOCIATION et al., Defendants and Respondents.	C081090 (Super. Ct. No. 39201400308392CUOESTK, STKCVUOE20140002183)

Plaintiff Ramatu Kabba brings this employment discrimination case against her former employer Dameron Hospital Association (Dameron) and former supervisor Doreen Alvarez (collectively defendants), alleging that she was discriminated against and subjected to harassment based on her national origin and age at the hands of Alvarez, and that Dameron failed to take reasonable steps to prevent it in violation of the California

Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.).[1] Kabba claims that she was forced to take a medical leave of absence due to the intolerable working conditions created by Alvarez in order to accomplish Alvarez's goal of getting rid of older, foreign-born employees, like Kabba, who, in Alvarez's words, "could not speak English," were "too old" and "ma[d]e too much money." While she was out on medical leave, Kabba sent a letter to Dameron's human resources (HR) director complaining about Alvarez's conduct. Kabba alleges that Dameron, through its HR director, retaliated against her for complaining about Alvarez by insisting that Kabba meet with the HR director and Alvarez before Kabba be allowed to return to work, and as a result, Kabba was forced to take a second medical leave from which she never returned. But for the HR director insisting that Kabba meet with Alvarez, Kabba claims that she would have returned to work at Dameron.

The operative second amended complaint asserts causes of action for discrimination (§ 12940, subd. (a); against Dameron), harassment (§ 12940, subd. (j); against Dameron and Alvarez), retaliation (§ 12940, subd. (h); against Dameron), failure to take all reasonable steps necessary to prevent discrimination and harassment (§ 12940, subd. (k); against Dameron), wrongful termination in violation of public policy (against Dameron), negligent supervision (against Dameron), declaratory relief (discrimination) (against Dameron), declaratory relief (retaliation) (against Dameron), and injunctive relief (Code Civ. Proc., § 526; against Dameron).[2]

Defendants moved for summary judgment, or in the alternative summary adjudication. The trial court granted defendants' motion for summary judgment. The

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[1] Undesignated statutory references are to the Government Code.

[2] While denominated "causes of action" in the complaint, declaratory and injunctive relief are remedies, not causes of action. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159.)

trial court found that Kabba could not make a prima facie showing of discrimination because she could not establish she was performing competently in her position, she suffered an adverse employment action, or a nexus between the complained of conduct and her national origin or age. The trial court also found that she could not make out a prima facie case of harassment because she could not establish that the harassment complained of was based on her national origin or age, or that it was sufficiently severe or pervasive. The trial court further found that Kabba could not make out a prima facie case of retaliation because she could not establish an adverse employment action, much less a causal link between any such action and her complaint against Alvarez. The trial court concluded that the remaining causes of action, claims for declaratory and injunctive relief, and request for punitive damages were derivative of Kabba's discrimination, harassment, and retaliation causes of action, and thus, could not survive summary judgment.

Kabba appeals, arguing that there are triable issues of material fact as to each of her causes of action, except negligent supervision, her claims for declaratory and injunctive relief, and her request for punitive damages. We agree in part. We will reverse the judgment and direct the trial court to vacate its order granting summary judgment and enter a new order granting summary adjudication of Kabba's retaliation, wrongful termination in violation of public policy, and negligent supervision causes of action, as well as her claim for declaratory relief (retaliation) and her request for punitive damages as to Dameron, but denying summary adjudication of her discrimination, harassment, and failure to take necessary steps to prevent discrimination and harassment causes of action, her claims for declaratory relief (discrimination) and injunctive relief, and her request for punitive damages as to Alvarez.[3]

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[3] This is one of six appeals pending before this court by former Dameron nursing employees who reported directly to Alvarez, alleging that they were discriminated against

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence set forth in the papers filed in connection with the summary judgment motion, except that to which objections were properly made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).) Consistent with the applicable standard of review, we summarize the evidence in the light most favorable to Kabba, the party opposing summary judgment, resolving any doubts concerning the evidence in her favor. (*Ibid*.)

A. Kabba's Early Employment With Dameron

Kabba, a registered nurse, worked at Dameron for approximately 10 years. She was born in Africa and immigrated to the United States. English is her second language and she speaks with a heavy accent. She was 46 years old when her employment with Dameron ended in 2012.

At all relevant times herein, Kabba worked as a unit coordinator in the telemetry department, which provides nursing care to patients who require cardiac monitoring with medical or surgical needs. As a unit coordinator, Kabba supervised nurses and other clinical personnel.

In May of 2011, Kabba received an annual performance evaluation from Roman Roxas, the then-director of the telemetry department. Roxas rated Kabba's "overall performance" a 3.03, which equated to "meets requirements." In October 2011, Denise Hair, the interim director of the telemetry department, prepared an "Administrative Review of [Kabba's] Performance as Unit Coordinator." The review was in letter form and did not include an "overall performance rating." Rather, it identified "strengths" and "areas for growth," and in closing stated, "Ramatu, you and your team have grown a lot.

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in violation of the FEHA. (See *Ortiz v. Dameron Hospital Assn.*, C081091; *Galvan v. Dameron Hospital Assn.*, C081092; *Arimboanga v. Dameron Hospital Assn.*, C081249; *Duke v. Dameron Hospital Assn.*, C081251; *Guiao v. Dameron Hospital Assn.*, C081755.)

I fully expect that you will continue to grow in your leadership abilities and that the unit will shine under your leadership."

B. Alvarez Becomes the Director of the Telemetry Department

In late 2011 or early 2012, Alvarez became the director of the telemetry department and Kabba's supervisor. Alvarez met with the unit coordinators at monthly unit coordinator meetings. The vast majority of unit coordinators were Filipino immigrants who, like Kabba, spoke with heavy accents.

C. Alvarez's Comments at Monthly Unit Coordinator Meetings

Every time Alvarez met with the unit coordinators during the roughly six-month period Kabba worked under her, she degraded and intimidated them. At her first unit coordinator meeting, Alvarez brought the unit coordinators' personnel files to the meeting and stated that she had found "horrible" and "disgusting" things in the files. She told them that she had already heard about them around the hospital, and that she was ready to "make a change." She also said that "she ha[d] eyes around the hospital" and whatever they said about her would get back to her.

Alvarez singled out unit coordinators who spoke English as a second language for criticism and often focused her comments on their accents and supposed poor English language skills. At one meeting, Alvarez said, "[E]verybody here with [a] thick accent, everybody here that do[esn't] know how to speak English. I don't know how Dameron gets you guys. Your accents are thick. [You] don't know what [you are] doing." She read from performance evaluations drafted by unidentified unit coordinators and criticized the drafters' grammar. She said that "those of you with a thick accent, those of you that cannot speak English . . . need to go back to school and learn how to read and write grammar." She told them that her 10-year-old son could write better than they could and threw the evaluations on the table. She also advised them that she was there to "clean the house."

At another meeting, Alvarez introduced a new unit coordinator who was White, and told the other unit coordinators, "She speak[s] good English. She's well educated. She's going to do a better job [than] most of you guys here because you guys don't know how to speak English."

At one of the monthly meetings, Alvarez stated that she wanted to get rid of the Filipinos and anyone else who did not know how to speak English. She also said she was there to replace the current unit coordinators "with new and younger" unit coordinators.

D. Alvarez's Comments to Bassey Duke

Bassey Duke was the clinical manager of the telemetry department and also reported to Alvarez. Alvarez repeatedly told Duke that the unit coordinators were "too old" and had "been there too long." She said that she wanted to get rid of the unit coordinators because they were "old dummies" and "don't speak English." She spoke to Duke about the need to "get[] lean" in order to facilitate a merger with the University of California Davis Medical Center.[4] At some point, she provided Duke with the names of unit coordinators she wanted to get rid of, including Kabba and several Filipino unit coordinators, because they were "dumb," "didn't' speak English," "didn't represent the face of U.C. Davis," "ma[d]e too much money," and "were old."

E. Schedule Change

When Kabba asked Alvarez if she could change her schedule, she received a "hostile" and "degrading" response. At the next unit coordinator meeting, Alvarez told the group, "Some of you guys asked me to change your schedule. Here are the

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[4] We grant Kabba's unopposed request for judicial notice of page 197 of the deposition of Bassey Duke, which was inadvertently omitted from her opposition to the motion for summary judgment filed in the trial court. (Evid. Code, §§ 452, subds. (d), (h); 459.)

resignation papers. . . . If you want, you move to another unit or you resign because I am not here to tolerate anything like that."

F. Electrocardiogram (EKG) Exam

Nurses in the telemetry department were required to take an annual EKG exam that tested their ability to read printouts of patients' heart rhythms. Kabba had taken EKG exams in previous years and passed each time. On July 10, 2012, Kabba took the annual EKG exam along with 10 to 15 other nurses. The exam was unannounced. They were given EKG "strips" and were asked questions requiring them to interpret the patient's heartbeat as represented on the strips. Kabba was one of two nurses from the telemetry department who failed the test.

In the past, the test was administered by the education department to two nurses at a time in a large, quiet room, and the nurses were given one hour to complete the test. This time the test was administered to 10 to 15 nurses at once in a small, noisy room with three proctors, including Alvarez, and the nurses were given only 30 minutes to complete it.

As Alvarez was grading the exams, she noticed similarities in some of the wrong answers on the tests, which suggested to her that the test takers had shared answers. On July 24, 2012, immediately before Kabba was scheduled to retake the exam, Alvarez directed Duke and Alvarez's assistant Karen Shurb to question Kabba about her answers on the earlier exam. Among other things, they asked her if she had shared her answers with anyone or if anyone had shared their answers with her. Kabba denied doing either. Kabba was upset by what she perceived to be an accusation of cheating and asked, "[W]hy are you treating us like second graders?" Duke and Shurb told her that she had to retake the exam right then or she would be fired. Kabba responded that she was too upset to take the exam and left the hospital.

G. Kabba Is Placed on Medical Leave

After leaving the hospital, Kabba went directly to her doctor who took her off work and placed her on a medical leave of absence due to stress. The next day, July 25, 2012, Kabba informed Dameron of her need for a leave of absence with an expected return date of August 15, 2012. Dameron granted her request, which was twice extended before Kabba was released to return to work on October 8, 2012.

After Kabba turned in her release paperwork to Dameron, she was contacted by someone in HR and told that she needed to meet with the HR director Maria Junez before returning to work. Kabba was scheduled to meet with Junez and Alvarez on October 9, 2012.

H. Kabba Complains to the HR Director About Alvarez

On October 8, 2012, Kabba wrote to Junez complaining about Alvarez's treatment of her and the other nurses and asked Junez to address the issues outlined in the complaint "before our scheduled meeting in HR with Doreen Alvarez on 10/9/12 at 11:30 a.m."[5] Kabba accused Alvarez of transforming what had been a "positive work environment" into "an extremely stressful and hostile work environment." Kabba explained that her "personal health began to deteriorate" and her "stress level began to get out of control" during the last two months (June and July) she worked at Dameron when Alvarez "abused [her] verbally and mentally, both in private and in front of other staff persons." She also stated that Alvarez's conduct caused her to have nightmares and headaches on a nightly basis.

I. October 9, 2012 Meeting

Junez's original plan was to meet with Kabba and Alvarez on October 9, 2012, and to terminate Kabba's employment for insubordination for her refusal to retake the

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[5] The letter is dated October 5, 2012, but it was e-mailed to Junez and others on October 8, 2012.

exam and "behavior regarding the whole situation." After receiving Kabba's complaint, Junez decided to hold off on the termination because she wanted to talk to Kabba about it. Junez's normal practice would have been to first meet with the complainant, then with any witnesses, and finally with the accused. She did not do so here. Rather, she decided "to take advantage of the time with [Kabba] and [Alvarez] so [they] could sort through that whole [complaint] letter."

When Kabba arrived for the meeting on October 9, 2012, she discovered that Junez and Alvarez were already meeting without her. When Junez emerged from the meeting with Alvarez, Kabba told her that she wanted to have a witness present. Junez said that she would be Kabba's witness, but Kabba said she wanted someone else because Junez and Alvarez had already met without her. Junez denied Kabba's request, asked Kabba if she was refusing to meet with her boss, and told her to go home.

J. Kabba Is Placed on Medical Leave a Second Time

The next day, Kabba sought and was granted a second medical leave of absence. Two days later, on October 12, 2012, Deborah Piceno, a human resource specialist at Dameron, wrote to Kabba and informed her that she had exhausted her 12 weeks of job-protected leave and had been "removed from [her] position in the 4th Floor Main Department." Piceno explained that while Kabba was not being terminated, she was not guaranteed the right to return to her former position or shift. Piceno directed Kabba to contact her to discuss "potential ways of finding other employment . . . at the Hospital" when she was able to resume work. Kabba requested and was granted ongoing extensions of her leave of absence through February 2013.

On November 28, 2012, Junez wrote to Kabba and advised her that they could discuss her complaint against Alvarez when Kabba returned from her leave of absence. When Kabba was eventually released to return to work, she took a job elsewhere. She did not consider applying for a position at Dameron because she interpreted Junez's last

letter as indicating that her complaint had not been investigated, and she did not want to return after what had happened.

DISCUSSION

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) As applicable here, a defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. (*Ibid*.)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is those allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

I

The Trial Court Erred in Granting Summary Judgment on Kabba's Discrimination Cause of Action

Under the FEHA, it is unlawful for an employer, because of a protected classification, to discriminate against an employee "in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) To state a prima facie case for discrimination in violation of the FEHA, a plaintiff must establish that (1) she was a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Once an employee establishes a prima facie case, a presumption of discrimination arises, and the employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. (*Id.* at p. 356.) If the employer produces a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination drops out of the picture, and the burden shifts back to the employee "to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Ibid*.)

This framework is modified in the summary judgment context: " '[T]he employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus,* such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' " (*Ibid.*)

Here, the trial court concluded that Kabba could not establish the second (performing competently), third (adverse employment action), or fourth (discriminatory motive) elements of her prima facie case. On appeal, Kabba contends that "[t]here were disputed factual issues about whether [she] satisfied the elements of a prima facie case." We agree.[6]

A. Kabba Presented Sufficient Evidence That She Was Performing Competently in Her Job

The trial court determined that "none of [Kabba's] evidence shows she was performing her job duties competently when she went out on leave in July 2012." In reaching this determination, the trial court dismissed the May 2011 performance evaluation that rated Kabba's overall performance as "meets requirements" as too remote and concluded that the October 2011 evaluation indicated that she was not performing competently because it listed several "areas for improvement." On the other hand, the trial court noted that Kabba failed her most recent EKG exam, which tested her competence with respect to an essential job function. Kabba argues on appeal that there were disputed factual issues about whether she was competently performing her job. Giving credence to her evidence, as we must, we have no trouble concluding that Kabba produced evidence sufficient to create a triable issue of material fact as to whether she was performing competently in her job.

Kabba's two most recent performance evaluations indicated that she was performing competently in her job. The fact that the May 2011 evaluation, which rated Kabba's overall performance as "meets requirements," was performed over a year before she went out on leave goes to its weight, not its relevance. The inclusion of "areas for growth" in the October 2011 evaluation does not mean that Kabba was not performing

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[6] We shall assume for purposes of appeal that defendants presented admissible evidence showing that one or more elements of Kabba's prima facie case is lacking. (*Serri v. Santa Clara University, supra,* 226 Cal.App.4th at p. 861.)

competently in her job as a matter of law, as the trial court appears to have assumed. While that is one possible interpretation, it is not the only one. A reasonable trier of fact could infer from that evaluation that Kabba was competently performing her job at that time, particularly given Hair's closing comment, "I fully expect that you will continue to grow in your leadership abilities and that the unit will shine under your leadership." Finally, Kabba's failure to pass her most recent EKG exam likewise does not mean that she was not performing competently as a matter of law. As set forth above, she passed the test in previous years, and based on the evidence presented, a reasonable trier of fact could find that her failure to pass the most recent exam was attributable to the test conditions and not her incompetence. Indeed, when asked whether it was her intent to fire Kabba for failing the EKG exam, Alvarez responded, "The intent was for her to retake the EKG test. She failed the first one. So technically we were waiting for her to take the test when she went out on leave."

In sum, Kabba presented sufficient evidence to allow a reasonable trier of fact to find that she was performing competently in her job.

B. Kabba Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That She Suffered an Adverse Employment Action

The trial court concluded that Kabba could not establish that she suffered an adverse employment action because she could not show that she was constructively discharged. The trial court did not address Kabba's alternative argument that she could establish an adverse employment action "short of termination" because Alvarez's conduct was reasonably likely to adversely and materially affect her job performance and opportunity for advancement. On appeal, Kabba contends that a reasonable trier of fact could conclude that she was constructively discharged because "the events she was forced to endure were so intolerable that a reasonable employee in her circumstances would have felt compelled to take a stress leave." Alternatively, she asserts that "an adverse employment action can be proven without establishing a constructive discharge,"

and "a jury could reasonably conclude that [the] combination of [Alvarez's conduct], culminating in the stress leave, placed Kabba's career in jeopardy and constituted an adverse employment action." We agree with the trial court that Kabba cannot establish that she was constructively discharged but conclude that she has established a triable issue of material fact as to whether Alvarez's conduct constituted an adverse employment action under the standard articulated by our Supreme Court in *Yanowitz, supra,* 36 Cal.4th at pages 1053-1055.

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245.) "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Id.* at p. 1251.) "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." (*Id.* at p. 1247, fn. omitted.)

The evidence presented establishes that Kabba first went out on medical leave on July 25, 2012, and was released to return to work on October 8, 2012. Sometime prior to October 8, 2012, she submitted her release paperwork to Dameron, and was scheduled to meet with Junez and Alvarez on October 9, 2012. When Kabba arrived for the meeting

on October 9, 2012, she saw that Junez and Alvarez were meeting without her and asked to have a witness present during the meeting with Junez and Alvarez. Junez denied her request, asked her if she was refusing to meet with her boss, and sent her home, telling her that she would be in touch. But for the incident on October 9, 2012, Kabba would have returned to work at Dameron as planned. Because Kabba intended to return to work at Dameron *after* being subjected to the adverse working conditions created by Alvarez, she cannot establish that she resigned or otherwise involuntarily severed her employment relationship with Dameron as a result of Alvarez's comments or conduct, all of which occurred prior to Kabba's first leave of absence in July 2012.

Kabba also claims that Junez's actions after Kabba filed her complaint "contributed to the intolerable conditions that [she] experienced." In particular, she points to Junez's decision to interview Kabba in Alvarez's presence after Kabba submitted her complaint, and Junez's denial of Kabba's request to have a witness present during the meeting with Junez and Alvarez. The evidence presented shows that Kabba was already scheduled to meet with Junez and Alvarez when she submitted her complaint, and that Junez decided to proceed with the meeting as planned so that they "could sort through" Kabba's entire complaint. Moreover, there is no evidence that Kabba had a right to have a witness present during her meeting with Junez and Alvarez. Kabba failed to present evidence sufficient to allow a reasonable trier of fact to find that the "conditions" created by Junez were so intolerable or aggravated that a reasonable person in Kabba's position would have been compelled to leave and never return.

Having concluded that Kabba cannot establish that she was constructively discharged, we next consider whether she can nevertheless show that she suffered an adverse employment action. An adverse employment action "must materially affect the terms, conditions, or privileges of employment to be actionable." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.) It includes "not only [the] so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that

are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940[, subdivision] (a) . . . the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id.* at pp. 1053-1054.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset and employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of" section 12940, subdivision (a). (*Yanowitz*, at pp. 1054-1055.)

"[I]n determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances" and "take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1036, 1052.)

Considering Alvarez's conduct in its totality and taking into account the particular circumstances of this case, including Alvarez's position as Kabba's direct supervisor, we conclude that a reasonable trier of fact could find that Alvarez's treatment of Kabba was likely to impair a reasonable employee's job performance or prospects for advancement or promotion, and thus, amounted to an adverse employment action. The record establishes that prior to the period relevant here, Kabba had worked for Dameron for 10 years, and her two most recent performance evaluations indicated that she was

performing competently in her position. When Alvarez became the director of the telemetry department in January 2012, she began making degrading comments to those unit coordinators, like Kabba, who spoke with heavy accents, telling them that they did not know how to speak English, did not know what they were doing, and needed to go back to school to learn to read and write. She told them that her 10-year-old son could write better than they could. She attempted to humiliate them in front of a new unit coordinator by telling them that the new unit coordinator would do a better job than they did because they did not know how to speak English. She threatened their jobs by telling them that she was there to "make a change," "clean the house," and replace them "with new and younger" unit coordinators. In addition, after Kabba and others asked to change their schedules, Alvarez threw "resignation papers" on a table and invited them to move to another department or resign. She also directed Duke and her assistant to accuse Kabba of cheating immediately before Kabba was scheduled to retake the EKG exam.

The conduct described above amounts to more than mere offensive utterances or a pattern of social slights. A person in Kabba's position reasonably could conclude that the system was rigged against people like her who spoke with a heavy accent and were older, that her job was in jeopardy, and that she was helpless to improve the situation. A reasonable trier of fact could conclude that Alvarez's actions were likely to do more than anger or upset; they were likely to impair a reasonable employee's job performance or prospects for advancement or promotion. More particularly, a reasonable trier of fact could find that an employee whose supervisor has made up her mind that the employee is incompetent based on the employee's accent and age has no hope of advancing, and that repeatedly telling the employee that she is incompetent because of her accent and threatening her job is likely to impair the employee's job performance.

The evidence presented creates a factual dispute that cannot be resolved at the summary judgment stage.

C. Kabba Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That Alvarez Acted With a Discriminatory Motive, and That There Was a Nexus Between Alvarez's Conduct and Kabba's Protected Status

The trial court found that "insulting [the unit coordinators'] accents and poor grammar does not create a nexus between Alvarez's conduct and [Kabba's] race/national origin" because "the unit coordinators were made up of Caucasians, Africans, African-Americans, Asians, Hispanics, and mostly Filipinos." The court also rejected Kabba's claim that she was discriminated against as a " 'non-native English' speaking person," finding that the FEHA does not protect such persons. As for Kabba's age, the court concluded that she failed to present any evidence showing that she was replaced by someone significantly younger than she was or that younger, similarly situated employees were treated more favorably. Kabba argues on appeal that "liability for national origin discrimination may be based on insults to an employee's foreign accent and language characteristics," and "[a]ge discrimination may be proven without evidence that a younger employee took her job or was treated better." We agree.

In *Fragante v. Honolulu* (9th Cir. 1989) 888 F.2d 591, the Ninth Circuit recognized that discrimination on the basis of a foreign accent can be the basis for a national origin discrimination claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). (*Fragante,* at p. 595; see also *Berke v. Ohio Dept. of Public Welfare* (6th Cir. 1980) 628 F.2d 980, 981 [discrimination on the basis of foreign accent sufficient basis for finding national origin discrimination].)[7] In support of its finding, the *Fragante* court cited to the Equal Employment Opportunity Commission (EEOC) Guidelines, which defined discrimination to include " 'the denial of equal employment

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[7] Because no reported California case addresses whether discrimination on the basis of a foreign accent is sufficient for finding national origin discrimination under the FEHA, we look to federal law. (*Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935, 948; see also *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278.)

opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group.' (29 C.F.R. § 1606 (1988).)" (*Fragante,* at p. 595.)[8] We are persuaded that discrimination on the basis of a foreign accent can be the basis for a national origin discrimination claim under the FEHA.

Having determined that discrimination on the basis of a foreign accent is covered under the FEHA, we next consider whether Alvarez's insults and threats, which were made in a group setting and not exclusively to Kabba or those with "African" accents, are sufficient to establish that Alvarez's insults and threats were motivated by Kabba's accent. As detailed above, Alvarez repeatedly singled out those who spoke with heavy accents, telling them that they did not know how to speak English, did not know what they were doing, and needed to go back to school to learn how to read and write. Because Kabba, who is African, has a heavy accent, a jury reasonably could find that Alvarez was expressing bias against her as well as the other unit coordinators who spoke with heavy accents. That Alvarez did not single Kabba out is of no consequence. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 714 [manager's statements about " 'getting rid of' " " 'all those fucking rag heads' " and the " 'Syrian regime' " provided more than a suggestion of discriminatory motive against the plaintiff, a naturalized citizen of Syria birth].)

Moreover, Alvarez's statements to Duke evidenced a discriminatory animus toward unit coordinators, like Kabba, who spoke with a foreign accent and were "old." As detailed above, Alvarez repeatedly told Duke that the unit coordinators were "too old" and had "been there for too long," and that she wanted to get rid of them because they

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8 The EEOC Guidelines currently "define[] national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or *linguistic characteristics* of a national origin group." (29 C.F.R. § 1606.1 (2019), italics added.)

"didn't speak English." She also told him that she wanted to get rid of Kabba and several other foreign-born unit coordinators because they were "dumb," "didn't speak English," "didn't represent the face of U.C. Davis," and "were old." Kabba herself also heard Alvarez state that she was there to replace the current unit coordinators "with new and younger" unit coordinators. Based on the evidence presented, a reasonable trier of fact could conclude that the conduct that resulted in the adverse employment action was motivated by Kabba's national origin and age.

II

The Trial Court Erred in Granting Summary Judgment on Kabba's Harassment/Hostile Work Environment Cause of Action

It is an unlawful employment practice under the FEHA for an employer to harass an employee because of national origin or age. (§ 12940, subd. (j)(1).) To establish a prima facie case of a harassment, Kabba must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) Here, the trial court found that Kabba could not establish a cause of action for harassment because there was nothing to indicate that Alvarez's comments or actions were based on her national origin or age, with the exception of Alvarez's comment that she was there to replace the current unit coordinators "with new and younger" unit coordinators, which the trial court concluded was "insufficient to establish 'severe or pervasive' harassment." Kabba argues on appeal that the comments about employees' accents and English language usage may constitute harassment based on national origin, Alvarez's statement that she wanted to replace the current unit coordinators with "new and younger" unit coordinators "was a frank expression of age-

based animus similar to her many [] statements to Duke," and there are disputed factual issues as to whether the harassment was sufficiently severe or pervasive. We agree.

A. Kabba Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That She Was Subjected to Unwelcome Harassment Based on Her National Origin and Age

Kabba presented evidence that Alvarez consistently criticized the unit coordinators' accents and assumed, based on their accents, that they could not speak English and did not know what they were doing. As detailed above, discrimination on the basis of an employee's foreign accent can be a sufficient basis for finding national origin discrimination under the FEHA and we are persuaded that harassment on the basis of a foreign accent likewise can be the basis for a national origin harassment claim under the FEHA.

Kabba also presented evidence that Alvarez made other degrading comments to the unit coordinators, told them she was there to "make a change" and "clean the house," distributed "resignation papers," administered the annual EKG exam without any prior notice and under stressful circumstances, and directed Duke and her assistant to accuse Kabba of cheating immediately before Kabba was scheduled to retake the EKG exam. While these comments and actions by themselves do not establish that they were based on Kabba's national origin or age, Alvarez's statements to Duke provide sufficient evidence from which a reasonable trier of fact could infer that they were. As detailed above, Alvarez repeatedly told Duke that the unit coordinators were "too old" and had "been there for too long," and that she wanted to get rid of them because they "didn't speak English." She also told him that she wanted to get rid of Kabba and several other foreign-born unit coordinators because they were "dumb," "didn't' speak English," "didn't represent the face of U.C. Davis," and "were old." In addition, Kabba heard Alvarez state that she was there to replace the current unit coordinators "with new and

younger" unit coordinators. Like Kabba, the vast majority of unit coordinators were foreign-born and spoke with heavy accents.

Kabba has presented sufficient evidence to allow a reasonable trier of fact to find that Alvarez directed the complained of comments and conduct at Kabba and the other older, foreign-born unit coordinators because of their age and national origin.

B. Kabba Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That the Harassment Was Severe and Pervasive

"[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [protected status]." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) "[H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." (§ 12923, subd. (a); see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 26 (conc. opn. of Ginsburg, J.).) "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (§ 12923, subd. (b).) "The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination." (§ 12923, subd. (c).) "The harassment must satisfy an objective and a subjective standard. ' "[T]he objective severity of harassment should be

judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' . . . " ' (*Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 462.) And, subjectively, an employee must perceive the work environment to be hostile. [Citation.] Put another way, '[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [she] was actually offended.' [Citation.]" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588.)

We have already concluded that Kabba presented evidence that would allow a reasonable trier of fact to find that Alvarez's treatment of Kabba was likely to impair a reasonable employee's job performance or prospects for advancement or promotion. That same evidence would allow a reasonable trier of fact to find that Alvarez's treatment would have adversely affected the psychological well-being of a reasonable employee.

Defendants claim that "Kabba's allegations do not amount to pervasive treatment" because "the demand that unit coordinators use proper grammar in performance evaluations is simply the lawful 'exercise of personnel management authority properly delegated by an employer to a supervisory employee.' (*Reno v. Baird*[(1998)] 18 Cal.4th [640,] 646 [citations omitted].)" We do not disagree; however, that is not a fair representation of the evidence presented in this case. As detailed above, Alvarez's comments and conduct went far beyond simply requesting unit coordinators use proper grammar.

Finally, while Alvarez's statement that she was there to "replace" people and that she intended to do so with "newer and younger" unit coordinators may not have been sufficiently severe or pervasive on its own to give rise to a hostile work environment, as the trial court found, a reasonable trier of fact easily could find that it was based on Kabba and the other unit coordinators' ages. Given the evidence of both national origin and age-based hostility, a reasonable trier of fact could conclude that Alvarez's comment

about replacing unit coordinators with newer and younger supervisors exacerbated the effect of her national origin-based harassment. (See *Cruz v. Coach Stores, Inc.* (2nd Cir. 2000) 202 F.3d 560, 572 [and cases cited therein].)

Based on the evidence presented, a reasonable trier of fact could find that Kabba subjectively perceived the workplace as hostile, and that a reasonable person in her position would share the same perception. Accordingly, the trial court erred in granting summary judgment on her harassment cause of action.

III

Summary Judgment Was Properly Granted on Kabba's Retaliation Cause of Action

The FEHA protects an employee against retaliation if the employee "has opposed any practices forbidden under this part . . . ." (§ 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042.)

The trial court assumed that Kabba engaged in a protected activity when she submitted her complaint concerning Alvarez to Junez, but concluded that Kabba could not establish that she suffered an adverse employment action after submitting her complaint. More particularly, the trial court found that "the letters HR sent [to Kabba] on [October] 12, 2012, regarding her FMLA leave, and on [October] 25, 2012, regarding her SDI benefits were standard practices for when an employee is out on leave an have no

link to [Kabba's] complaint," and "asking [Kabba] to meet with HR and the person she complained about" is not an action that would establish a constructive termination.

Kabba contends on appeal that "[a] jury could reasonably find that HR director Junez responded hostilely to [Kabba's] complaint" by "ignor[ing] her training and . . . schedule[ing] a meeting with [Kabba] *and* Alvarez together," refusing Kabba's request to have a witness present at the meeting, and failing to investigate Kabba's complaint. Defendants respond that even assuming that Kabba's October 8, 2012 letter to Junez constituted a protected activity, "Kabba's characterization of the events which followed do[es] not create triable issues of material fact of retaliation." Defendants are correct.

"[A]dverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of" section 12940, subdivision (h). (*Yanowitz, supra,* 36 Cal.4th at pp. 1054-1055.)

First, Kabba provides no authority for the proposition that the failure to adequately or properly investigate a harassment complaint qualifies as an adverse employment action. To the contrary, federal appellate courts have held, in retaliation claims under federal law, an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint. (*Fincher v. Depository Trust & Clearing Corp*. (2nd Cir. 2010) 604 F.3d 712, 721; see also *Daniels v. UPS* (10th Cir. 2012) 701 F.3d 620, 640-641; *Chuang v. University of Cal. Davis* (9th Cir. 2000) 225 F.3d 1115, 1126 [failure to respond to employee's grievances does not amount to an adverse employment action].)

Second, it is undisputed that Kabba was already scheduled to meet with Junez and Alvarez when she submitted her complaint. Thus, Kabba's claim that that Junez failed to follow her normal procedure when she "scheduled a meeting with [Kabba] *and* Alvarez together" fails. In any event, Kabba's evidence establishes that Kabba was willing to meet with Alvarez on October 9, 2012, as scheduled, so long as there was a witness

present. Junez's decision to proceed with the meeting as scheduled does not constitute an adverse employment action.

Third, Junez's denial of Kabba's request to have a witness present does not constitute an adverse employment action because it was not reasonably likely to adversely and materially affect a reasonable person's job performance or opportunity for advancement. (*Yanowitz, supra,* 36 Cal.4th at pp. 1053-1054.) There is no evidence that Kabba had a right to have a witness present. Nor is there anything inherently sinister about Junez meeting with Alvarez prior to their meeting with Kabba.

Even assuming for argument's sake that Junez's decision to proceed with the meeting and her denial of Kabba's request for a witness constitutes an adverse employment action, there is no evidence that Junez's conduct was attributable to Kabba's protected activity, i.e., the filing of the complaint. As previously discussed, the meeting was scheduled *before* Kabba filed her complaint.

For all the foregoing reasons, summary judgment was properly entered as to Kabba's retaliation cause of action.

IV

The Trial Court Erred in Granting Summary Judgment on Kabba's Failure to Take All Reasonable Steps Necessary to Prevent Discrimination and Harassment Cause of Action

Under the FEHA, it is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940, subd. (k).) The trial court granted summary judgment on Kabba's failure to take necessary steps to prevent harassment and discrimination cause of action on the ground that no such action lies if no harassment or discrimination has occurred. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 ["Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented"]; see also Cal. Code Regs., tit. 2, § 11023, subd. (a)(2).) As detailed above, we conclude that Kabba submitted

evidence sufficient to create a triable issue of material fact as to whether discrimination and harassment occurred. Thus, the basis for the trial court's ruling is no longer valid.

It is well settled, however, that on appeal following summary judgment, the trial court's reasoning is irrelevant, and the matter is reviewed on appeal de novo. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140 (*Jimenez*).) "We exercise our independent judgment as to the legal effect of the undisputed facts [citation] and must affirm on any ground supported by the record." (*Ibid.*) Defendants contend that summary judgment was properly granted on the failure to take steps necessary to prevent discrimination and harassment cause of action because "Dameron submitted evidence of its efforts to prevent discrimination and harassment." In support of their contention, defendants assert, "Kabba received copies of Dameron's employee handbook which contained its anti-discrimination and anti-harassment policies. Dameron's Corporate Compliance Code of Conduct contains guidelines and a hotline for reporting suspected unlawful activity and its commitment to maintain a work environment free from discrimination. Dameron further posted anti-discrimination and retaliation posters required by the FEHA in conspicuous locations."

Determining whether an employee has complied with section 12940, subdivision (k) includes an individualized assessment based on numerous factors such as workforce size, budget, and nature of its business, as well as the facts of a particular case. (Cal. Code Regs., tit. 2, § 11023, subd. (a)(1).) Defendants' evidence, while relevant, fails to show that Kabba's failure to prevent discrimination and harassment cause of action has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) Accordingly, the trial court erred in granting summary judgment on this cause of action as well.

V

Summary Judgment Was Properly Granted on Kabba's Cause of Action for Wrongful Termination in Violation of Public Policy

The trial court granted summary judgment on Kabba's wrongful termination in violation of public policy cause of action on the ground that Kabba "bases [her] claim on age and race/national origin discrimination," and "[d]efendants have shown [Kabba] cannot establish her claims of discrimination." Kabba appeals, contending that because the court erred in granting summary judgment on her discrimination and harassment causes of action, it also erred in granting summary judgment on her wrongful termination in violation of public policy cause of action. We are not persuaded.

We concluded above that summary judgment was not properly entered on Kabba's discrimination and harassment causes of action. Thus, the basis for the trial court's ruling is no longer valid. As previously discussed, however, we may affirm on any ground supported by the record. (*Jimenez, supra*, 130 Cal.App.4th at p. 140.) The evidence presented shows that Kabba was not terminated, and we concluded above that she cannot establish that she was constructively discharged. Absent evidence that Kabba was terminated or constructively discharged, Kabba cannot establish that she was wrongfully discharged in violation of public policy. (*Turner v. Anheuser-Busch, Inc., supra,* 7 Cal.4th at pp. 1244-1245.) Accordingly, summary judgment was properly granted on the wrongful termination in violation of public policy cause of action.

VI

Summary Judgment Was Properly Granted on Kabba's Claim for Declaratory Relief (Retaliation) and Improperly Granted on Her Claims for Declaratory Relief (Discrimination) and Injunctive Relief

Kabba's complaint contains causes of action for declaratory relief related to her discrimination and retaliation causes of action under section 1060 of the Code of Civil Procedure, as well as injunctive relief. The trial court granted summary judgment on Kabba's claims for declaratory and injunctive relief on the ground that they "are

derivative of her other causes of action," which the court ruled could not survive summary judgment. On appeal, Kabba contends that "[s]ince the underlying causes of action should have survived, so must the claims for declaratory and injunctive relief." We agree in part.

We have concluded that summary judgment was properly granted on Kabba's retaliation cause of action. Because her claim for declaratory relief (retaliation) is derivative of her retaliation cause of action, summary judgment was properly entered as to that claim.

We also have concluded that the trial court improperly granted summary judgment on Kabba's discrimination and harassment causes of action. "[U]pon a finding of unlawful discrimination, a court may grant injunctive relief where appropriate to stop discriminatory practices." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 234.) The same is true with respect to declaratory relief. (*Ibid.*) "[P]roof that an adverse employment decision was substantially motivated by discrimination may warrant a judicial declaration of employer wrongdoing." (*Ibid.*) Accordingly, we conclude that the trial court erred in granting summary judgment on Kabba's declaratory relief (discrimination) and injunctive relief claims.

VII

Summary Judgment Was Properly Entered on Kabba's Claim for Punitive Damages as to Dameron But Not as to Alvarez

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence, that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant." Subdivision (b) of that section states: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the

employee and employed him or her in conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. *With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.*" (Italics added.) A managing agent is "someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar* (1999) 21 Cal.4th 563, 573 (*White*).)

Here, the trial court determined that "[s]ince none of [Kabba's] causes of action survive this motion, she will not be able to prove or receive actual damages," so punitive damages are likewise unavailable. We have concluded that a number of Kabba's causes of action shall survive summary judgment, including her discrimination and harassment causes of action. Accordingly, the basis for the trial court's ruling is no longer valid. As detailed above, however, we may affirm on any ground supported by the record. (*Jimenez, supra,* 130 Cal.App.4th at p. 140.)

Defendants argued below that summary judgment of Kabba's request for punitive damages is appropriate because "none of the alleged wrongdoers named in the complaint were managing agents for defendant [Dameron]." Among other things, defendants presented evidence that neither Alvarez nor Junez "autonomously set policy for Dameron Hospital Association," Alvarez did not "exercise substantial independent authority over a significant portion of [Dameron's] business," and Junez "only exercises discretion and authority within Human Resources under the oversight of the Vice-President of Human Resources." In response, Kabba failed to point to any evidence that would support a finding that Alvarez or Junez were managing agents. Rather, Kabba asserted that "[w]hether Ms. Alvarez's level of authority raises to the level of managing agent or that her conduct was ratified by Defendant, for purposes of punitive damages, is for a jury to determine based on the facts." In the context of a summary judgment motion, where, as

here, the defendant made a prima facie showing that the plaintiff cannot establish an element of the cause of action, Kabba was required to produce evidence sufficient to create a triable issue of material fact. She failed to do so.

As for Junez, Kabba cited to Junez's "overall role in terminations, investigations and oversight." Such evidence is insufficient to create a triable issue on whether Junez was a managing agent.[9] "[S]upervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under [Civil Code] section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.) Kabba failed to produce evidence that would allow a reasonable trier of fact to conclude that Junez exercised such authority.

For the reasons stated above, summary judgment was properly entered on the request for punitive damages as to Dameron. The complaint, however, also seeks punitive damages from Alvarez, who is named as a defendant in the harassment cause of action. Alvarez may be liable for punitive damages if it is "proven by clear and convincing evidence that [she] has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, §

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9 Kabba also asserted generally that "Junez testified to her direct involvement in drafting policies and procedures." The evidence cited, however, does not support her assertion. In any event, having direct involvement in drafting unspecified policies and procedures is insufficient to show that someone is a managing agent. (*White, supra,* 21 Cal.4th at pp. 573, 577.)

3294, subd. (c)(1).) On the record before us, we have no trouble concluding that Kabba presented sufficient evidence to raise a triable issue of fact as to whether Alvarez acted with malice. Based on the evidence presented, a jury could find that Alvarez's conduct was despicable and carried out with a willful and conscious disregard for the rights of others, including Kabba. Accordingly, summary judgment was not properly entered on the request for punitive damages as to Alvarez.

VIII

The Trial Court Abused Its Discretion in Excluding Evidence of Statements Made By Alvarez Concerning Kabba and the Other Unit Coordinators

The trial court sustained without explanation 31 of defendants' 72 objections to Kabba's evidence. On appeal, Kabba challenges the trial court's ruling as to 13 of those objections. Much of the evidence that is the subject of the challenged rulings is not material to the resolution of the issues raised on appeal. We shall limit our review to the evidentiary rulings that pertain to evidence that is material to our resolution of the issues raised on appeal and shall review those rulings for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

The trial court sustained defendants' objection No. 34 to Kabba's testimony that Junez and Alvarez met for an hour while she waited outside. Defendants objected to this evidence on relevance grounds. The evidence helps explain why Kabba did not return to work after she was released to do so, and thus, is relevant to Kabba's claim that she was constructively discharged. The trial court abused its discretion in excluding it.

The trial court sustained defendants' objection No. 36 to Kabba's testimony that Junez stated, "[Y]ou are refusing to meet with your boss" and told her to "[g]o home." Defendants objected to this evidence on relevance and hearsay grounds. Junez's statements are not made inadmissible by the hearsay rule because they are being offered against the declarant (Alvarez) in an action to which she is a party. (Evid. Code, § 1220.) This evidence helps explain why Kabba did not return to work after she was released to

do so, and thus, is relevant to Kabba's claim that she was constructively discharged. The trial court abused its discretion in excluding it.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to vacate its order granting the motion for summary judgment and to enter a new order granting the motion for summary adjudication as to the retaliation, wrongful termination in violation of public policy, and negligent supervision causes of action, as well as the claim for declaratory relief (retaliation) and the request for punitive damages as to Dameron, but denying the motion for summary adjudication as to the causes of action for discrimination, harassment, and failure to take necessary steps to prevent discrimination and harassment, the claims for declaratory relief (discrimination) and injunctive relief, and the request for punitive damages as to Alvarez. In light of our rulings in this and several other appeals by former Dameron nursing employees who reported directly to Alvarez, we further direct the trial court to reassign this matter to a different judge. Kabba shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
BLEASE, Acting P. J.

We concur:

/s/
ROBIE, J.

/s/
DUARTE, J.